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IN THE CIRCUIT COURT OF CABELL COUNTY, WEST VIRGINIA

**IN RE: TAX ASSESSMENT OF FOSTER FOUNDATION'S WOODLANDS
RETIREMENT COMMUNITY**

**CIVIL ACTION NO: 07-C-214
Judge John L. Cummings**

ORDER

On a day previous came the Plaintiff, Foster Foundation, Inc., by counsel, Audy M. Perry, Jr., and the Cabell County Commission, by counsel, William T. Watson, upon Plaintiff's Petition for Appeal assigning as error the County Commission's refusal to lower the assessed value of the Woodlands' property. Having reviewed the record, the representations of counsel, and the statutory and case law relative to the issue, the Court FINDS, CONCLUDES and ORDERS as follows:

FINDINGS OF FACT

1. The Foster Foundation is a 501(c)(3) non-profit organization engaged in the operation of Woodlands, which is a home for the aged not conducted for private profit.
2. By letter dated January 2, 2007, the Cabell County Assessor's Office notified the Foster Foundation that for the tax year 2007 the assessed value of the Woodlands would be based upon an appraised value of \$38,137,300.00.
3. On or about January 31, 2007, the Foster Foundation filed an Application for Review of Property Assessment with the County Commission challenging the Assessor's appraised value of \$38,137,300.00 for tax year 2007.
4. By letter dated January 24, 2007, the Foster Foundation was informed that its hearing before the Cabell County Commission would be on February 9, 2007 and that it must submit clear and convincing evidence to prove the assessment was in fact erroneous.

5. The Foster Foundation retained the services of Robert K. Withers, a licensed appraiser, to conduct an appraisal of the Woodlands and Mr. Withers determined that the fair market value of the Woodlands was \$14,900,000.00.

6. On February 9, 2007, the hearing on the Foster Foundation's Application for Review was conducted before the Board of Equalization (the "Board"). After all of the evidence, testimony, oral and written arguments were entered into the record, the Board informed the Foster Foundation that it would be notified by mail as to the Board's decision.

7. At the hearing, the Foster Foundation learned that the Woodlands had been assessed by Mr. Brian Daniels, an employee of the Assessor's Office, who had originally assessed the property at an appraised value of \$38,137,300.00.

8. On February 22, 2007, the Board, after hearing the evidence, testimony and oral and written arguments, entered an Order reducing the appraised value of the Woodlands to \$29,759,000.00 for the tax year 2007.

9. By letter dated February 26, 2007, the County Commission notified the Foster Foundation of its February 22, 2007 Order.

10. Based upon the Order of the County Commission, the Plaintiff filed its Petition for Appeal seeking relief from the alleged excessive assessment of the Woodlands' value.

CONCLUSIONS OF LAW

11. West Virginia Code §11-3-1 requires that "[a]ll property shall be assessed annually...at its true and actual value." True and actual value means fair market value, which is what the property would sell for if it were sold on the open market. See Kline v. McCloud, 326 S.E.2d 715 (1984). In determining the fair market value of a piece of land, the County Assessor must seek out all

information which would enable him to properly fulfill his legal obligation. Id.

12. As discussed in In Re: Tax Assessment Against American Bituminous Power Partners, L.P., 539 S.E.2d 757, (2000) W.Va., the burden upon the taxpayer to demonstrate error with respect to the State's valuation is heavy in these proceedings:

"It is a general rule that valuation for taxation purposes fixed by an assessing officer are presumed to be correct, the burden of showing an assessment to be erroneous is, of course, upon the taxpayer, and proof of such fact must be clear. Syl. Pt. 7, In Re: Tax Assessments Against Pocahontas Land Co., 172 W.Va. 53, 303 S.E.2d 691 (1983)." Syl. Pt. 1, Western Pocahontas Properties, Ltd. v. County Comm'n of Wetzel County, 189 W. Va. 322, 431 S.E.2d 661 (1993). In challenging a tax valuation, "the burden [of proof] clearly falls upon . . . [the taxpayer] to demonstrate through clear and convincing evidence that the tax assessments were erroneous." In Re: Maple Meadow Min. Co., 191 W. Va. 519, 523, 446 S.E.2d 912, 916 (1994); see also Pocahontas Land, 172 W. Va. At 61, 303 S.E.2d at 699 ("It is obvious that where a taxpayer protests his assessment before a board, he bears the burden of demonstrating by clear and convincing evidence that his assessment is erroneous."); Syl. Pt. 2, in part, Western Pocahontas Properties, Ltd., *supra* ("The burden is on the taxpayer challenging the assessment to demonstrate by clear and convincing evidence that the tax assessment is erroneous.").

13. The West Virginia Supreme Court on several different occasions has stated that the law presumes the Assessor's valuations to be correct and places the burden of proving an incorrect assessment before the Board of Equalization and Review on the taxpayer. These decisions hold that the taxpayer must prove by competent evidence that the Assessor or the Tax Commissioner arrived at an incorrect value. Only after the taxpayer has met his or her burden, then the Assessor or the Tax Commissioner must show that the values are in fact correct.

(1) "Therefore, the tax commissioner's appraisal should be presumed to be correct and the assessed value should correspond to the appraisal value in the usual case. An objection to any assessment value may be sustained only upon the presentation of competent evidence, such as that equivalent to testimony of qualified appraisers that the property has been under or over appraised by the tax commissioner and wrongly assessed by the assessor. The objecting party, whether it be the taxpayer, the tax commissioner or another third party, must

show by a preponderance of competent evidence that the assessment is incorrect.” Ray Killen, as President, Logan County Board of Education, Etc., et al v. Logan County Commission, Etc., et al., 295 S.E.2d 689, 170 W.Va. 602, (1982).

(2) “It is a general rule that valuations for taxation purposes fixed by an assessing officer are presumed to be correct. The burden of showing an assessment to be erroneous is, of course, upon the taxpayer, and proof of such fact must be clear.” In Re: Tax Assessments Against Pocahontas Land Co., et al., 303 S.E.2d 691, 172 W.Va. 53, (1983).

(3) “As we have previously recognized, there is a presumption that valuations for taxation purposes fixed by the assessing officer are correct, and the burden is on the taxpayer to demonstrate by clear and convincing evidence that the assessment is erroneous.” Western Pocahontas Properties, Ltd., and Littleton Fuel Company v. The County Commission of Wetzel County, West Virginia, et al., 431 S.E.2d 661, 189 W.Va. 322 (1993).

14. With respect to West Virginia Code §30-38-1, with particular reference to subsection (c)(5), it is provided that an employee of ...a political subdivision of the State of West Virginia does not have to be licensed and certified to perform appraisals.

15. With respect to the Plaintiff’s argument that the Assessor improperly considered the valuation method used in evaluating the Woodlands’ property, the West Virginia Supreme Court in In Re: Tax Assessment Against American Bituminous Power Partners, L.P. stated the Tax Commissioner was required to “consider” the various approaches to valuation by contemplating the feasibility of utilizing each of the described methods. On the other hand, these methods are to be “used” or actually employed only where “applicable.”

The Court went on to hold that “the exercise of such discretion will not be disturbed upon judicial review absent a showing of abuse of discretion.”

ORDER

Given the aforementioned Court decisions as well as the regulations and statutes, the Plaintiff failed to prove by clear and convincing evidence that the Assessor erroneously valued its property.

Accordingly, the determination of value by the Assessor must stand and the relief requested by the taxpayer must be denied. To all of which the Plaintiff excepts and objects.

Dated: This 6th day of September, 2007.

/s/ JOHN L. CUMMINGS

JOHN L. CUMMINGS, JUDGE

STATE OF WEST VIRGINIA
COUNTY OF CABELL
I, ADELL CHANDLER, CLERK OF THE CIRCUIT
COURT FOR THE COUNTY AND STATE AFORESAID
DO HEREBY CERTIFY THAT THE FOREGOING IS A
TRUE COPY FROM THE RECORDS OF SAID COURT
ENTERED ON SEP 6 - 2007
GIVEN UNDER MY HAND AND SEAL OF SAID
COURT THIS SEP 6 - 2007

PREPARED FOR ENTRY BY:

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BY: William T. Watson

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Adell Chandler CLERK
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